

UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD

RICHARD C. BARTEL,

Petitioner,

v.

FEDERAL AVIATION ADMINISTRATION,

Respondent.

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) MSPB Docket No.  
) PH03538010219COMP  
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) Date: 28 NOV 1984  
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OPINION AND ORDER

This case is before the Board on the issue of compliance. Appellant filed a petition for enforcement with the Board's Philadelphia Regional Office alleging failure by the agency to comply with a final decision of the Board. The Regional Director has issued a recommended decision ordering agency compliance.

BACKGROUND

Appellant filed two separate appeals with the Board. In the first he alleged that the agency failed to give appellant proper consideration for reemployment in GS-13 level position; in the second he appealed his removal for unauthorized absence from work.

After an intervening period of service with an international organization, appellant was reemployed as an Aviation Safety Inspector, GS-12. He appealed this reemployment to the Board's

Philadelphia Regional Office, invoking appeal rights provided by 5 C.F.R. § 352.508. In his appeal, appellant alleged that the agency had violated the provisions of 5 C.F.R. §§ 3581-3584, Executive Order 11552, and Federal Aviation Administration Order 3330.6B by failing to give him due consideration for a GS-13 appointment upon his return and that the agency had done so in retaliation for his earlier filing of an Equal Employment Opportunity complaint.

After five months in the GS-12 position appellant took a significant amount of time off work. Three months later he received a notice of removal from the agency for unauthorized absences. After receiving the notice, appellant attempted to resign twice. The agency refused to accept his resignation and removed him. He appealed this removal to the Board's Philadelphia Regional Office. The presiding official ruled against appellant in both cases, and upon petition, the Board granted review of both decisions.

In a final decision issued November 22, 1982, the Board reversed both initial decisions. The Board found that since the agency had refused appellant's tendered resignation the removal was improper. Additionally, the Board concluded that the agency had denied appellant meaningful consideration for the GS-13 position in reprisal for his previous exercise of protected appeal rights.

The agency was ordered to reconstruct the selection process for the GS-13 position, ensure that the selection process was free of unlawful bias, and, if appellant was selected for the

position, appoint him to it retroactively through the effective date of his resignation.

Appellant filed a petition for review of the Board's November 22, 1982 decision with the Equal Employment Opportunity Commission (EEOC). The EEOC concurred with the Board's conclusion regarding the consideration for the GS-13 position, but ordered a different remedy for appellant. Rejecting the idea of reconstruction of the selection process, the EEOC concluded that, since the agency had not shown by clear and convincing evidence that appellant would not have been promoted absent discrimination, appellant was entitled to retroactive promotion. The Board concurred in and adopted this decision in the December 21, 1983 order.

Appellant filed a petition for enforcement with the Board's Philadelphia Regional Office January 24, 1984, alleging that the agency had failed to comply with the Board's final decision. The Regional Director instructed appellant to show cause why compliance was not indicated, and appellant filed a response February 21, 1984. In the response, appellant argued that while the agency had retroactively promoted him to a position as an Aviation Safety Inspector, GS-13 at the Sandston, Virginia duty station, full compliance required that he be retroactively promoted to the specific position at Dulles International Airport that was the subject of his appeal. Appellant further alleged that he had not received a full award of back pay from the agency at the GS-13 level. The Regional Director issued a compliance decision March 12, 1984, in which he ordered the agency to

retroactively appoint appellant to the specific GS-13 position that was denied him upon reemployment. The Regional Director found that issues of back pay are to be resolved by the agency and the appellant and denied appellant's claim of non-compliance on the back pay issue.

Appellant has now petitioned the Board for review of the March 12, 1984 decision, requesting that the Board order back pay at the GS-13 level from the date of his reemployment, May 11, 1980, through the date of his effective resignation, February 28, 1981.

The agency, in its response to appellant's petition for review, argues that it is irrelevant to which GS-13 position appellant was retroactively appointed and that the only significant issue is the amount of the back pay award. With regard to this issue, the agency asserts that appellant had significant periods of leave without pay (LWOP) and absence without leave (AWOL) during his reemployment and that appellant should not be credited with back pay for these periods.

#### ANALYSIS

##### The GS-13 Position

In the December 21, 1983 final order the Board instructed the agency "to promote the appellant retroactively to GS-13 level from the date of his reemployment to the effective date of his resignation." In appellant's February 21, 1984 response to the

Regional Director's show cause order, he argues that the specific position for which he was denied consideration is not the position to which he was retroactively promoted. He was promoted instead, he contends, to "an upgrade of a temporary identical position in Sandston, Va. which no longer exists." Appellant maintains that the jobs differ in their position descriptions and that this difference affects the quality of job enhancement training available to an incumbent. Appellant admits that the OPM qualification standard is the same for each position.

Appellant's attorney also filed a response to the show cause order in which the only asserted difference between the positions is their locations.

In Kerr v. National Endowment for the Arts, 726 F.2d 730 (1984), the United States Court of Appeals for the Federal Circuit held that the Board's enforcement of compliance must include more than a determination that the appellant has been reinstated to a position of the same title, grade, and pay as the one unjustly denied him. The Court stated at 733:

Rather, the Board should, where appropriate, also make a substantive assessment of whether the actual duties or responsibilities to which the employee was returned are either the same or substantially equivalent in scope and status to the duties and responsibilities held prior to the wrongful discharge.

In this case, the reappointment and promotion of appellant was an exercise which took place on paper only, intended to span that specific period of time between his reemployment and his resignation. Since appellant, having resigned, did

not officially resume his position, his situation is different from that of the appellant in Kerr, who actually returned to duty, but alleged that the position to which he was reinstated was a sham. Moreover, since the type of training available and the job's location are rendered irrelevant by the fact that appellant has resigned, appellant has offered no evidence of any real difference between the positions in question. The Court's qualification in Kerr, "where appropriate," is significant here, as the situation presented by this case is one where it is inappropriate for the Board to concern itself with the duties and responsibilities of the positions. For these reasons we REVERSE the compliance decision on the issue of the GS-13 position.

#### The Back Pay Issue

The Regional Director did not have the benefit of recent decisions in which the Board exercised its authority to order back pay in its review of the personnel actions subject to its jurisdiction. Robinson v. Department of the Army, MSPB Docket No. SF07528310135 (June 12, 1984) at 3; Clements v. Department of the Navy, MSPB Docket No. AT07528210457 (June 12, 1984). More recently, the Board has also held that it has authority to review the merits of petitions for enforcement alleging error in the agency back pay award. Spezzaferro v. Federal Aviation Administration, MSPB Docket No. BN075281F0717COMP (October 23, 1984).

In the instant case the issues are: (1) whether the provisions of 5 U.S.C. §5596, the Back Pay Act, entitle appellant to pay during periods of AWOL or LWOP; and (2) whether appellant was AWOL or on LWOP and, if so, for how long.

The Back Pay Act provides for the reimbursement to an employee who has been subject to an unjustified or unwarranted personnel action of all "pay allowances or differentials, as applicable, which the employee would have earned or received if the personnel action had not occurred." The key to measuring such awards, as indicated by this language, is to construct what would have been the circumstances had the personnel action never been taken. In this case, had the improper personnel action never been taken, appellant would still not be entitled to pay for periods during which he was AWOL or on LWOP. Additionally, as the Back Pay Act has been applied, an employee is not entitled to back pay for periods during which the employee was unavailable for work so long as such unavailability was not related to the unwarranted personnel action. 5 C.F.R. §550.804; Sexton v. Kennedy, 523 F.2d 1311 (6th Cir. 1975), cert. denied, 425 U.S. 973 (1976). Indeed, a prerequisite to an award of back pay is a showing by the employee that he or she was ready, willing, and able to work during the period to which the award is to apply. Kanarek v. United States, 394 F.2d 525 (Ct. Cl. 1968), cert. denied, 394 U.S. 1013 (1969).

In this case, it is undisputed that appellant was away

from work for a significant amount of the time period spanned by the unwarranted action. The question is whether appellant has shown that his absence was somehow related to the personnel action and that he was ready, willing, and able to work during that time.

Because the record in our possession does not contain sufficient information on this question, such a review and determination must be decided on remand to the Regional Office.

Accordingly, for the reasons set forth above, the compliance decision is hereby REVERSED on the issue of the GS-13 position, and the case is REMANDED to the Philadelphia Regional Office for resolution of the back pay issue.

For the Board:

Washington, D.C.



Stephen E. Manrose  
Acting Clerk of the Board